Supreme Court, U.S.
FILED

No. 98 443 SEP 14 1998

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In The

Supreme Court of the United States

October Term, 1997

JANET KATHLEEN WAGNER,

Cross-Petitioner,

vs.

MICHAEL C. DELEW; MICHAEL C. DELEW, as Special Administrator of the Estate of Erin Rae DeLew; H. ROY MAYBERRY and VICKIE MAYBERRY,

Cross-Respondents.

Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the heirs of a decedent may maintain a federal lawsuit under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, against a private citizen for denial of access to the courts while maintaining a state court action for the wrongful death of their decedent.

2. Whether an alleged inadequate police investigation is sufficient to state a cause of action under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983 when no other recognized constitutional right is involved.

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Janet Wagner respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *DeLew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 143 F.3d 1219 and is reprinted in the appendix to Petitioner's petition for writ of certiorari (hereinafter "Pet.App.") at pp. 1a to 9a. The order of the United States District Court for the District of Nevada, CV-S-97-090-PMP(LRL) dismissing Petitioners' complaint is unreported and is reprinted at Pet.App. 10a to 12a.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals issued its decision and judgment herein on May 11, 1998. Cross-Respondent/Petitioner Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry ("Petitioners" or "DeLews") filed their petition for writ of certiorari on August 10, 1998 and the petition was placed on the docket on August 13, 1998.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioner's petition for writ of certiorari.

STATUTORY PROVISION INVOLVED

The Federal Civil Rights Act of 1871, 42 U.S.C. § 1983 provides:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Janet Wagner was sued in Clark County District Court (State of Nevada) by the DeLews for the wrongful death of Erin DeLew. Erin DeLew died as the result of an automobile/bicycle accident that occurred on September 27, 1994. The original complaint against Janet Wagner was filed on November 10, 1994 in the Eighth Judicial Court of Clark County Nevada. That action is still viable and scheduled for trial in Clark County

District Court in February of 1998. A subsequent action (the instant action), filed on September 26, 1996, asserted a 42 U.S.C. § 1983 civil rights violation against the investigating officers of the automobile/bicycle accident and a conspiracy claim against Janet Wagner.

During the course of discovery in the state court action against Janet Wagner the DeLews have been allowed free, complete and total access to the accident investigation and facts surrounding this accident. At no time have they been denied information concerning the details of the accident or the investigation that followed. Each officer involved in the investigation has testified at length (most for a full day) in deposition about his involvement, about his training and about the procedures for conducting a fatal accident investigation. Each has testified about his contact with Mrs. Wagner, her husband's non-involvement in the investigation and the details concerning their perception of her and her conduct at the accident scene. Appendix A-1 to A-10.

The plaintiffs have not only had full access to the complete laboratory reports concerning Mrs. Wagner's blood/alcohol, but, over the objections of the defendant, they have taken the remaining blood sample and submitted it to their own independent laboratory for analysis.

Despite the fact that the trial judge in the wrongful death action has indicated that the plaintiffs would be allowed to explore the role of the traffic investigators the plaintiffs realize that all evidence points to the culpability of the bicyclist, Erin DeLew. Unless they can put the police on trial in the same case there is little chance for the plaintiffs to prevail in an automobile negligence action.

Even though the original wrongful death action remains viable and is scheduled for jury trial the DeLews brought an

action claiming that they had been deprived of "meaningful access to the courts." The only method to obtain jurisdiction over Janet Wagner in the § 1983 action is to allege a conspiracy. However, the DeLews' complaint is deficient.

A conspiracy action against a civilian under 42 U.S.C. § 1983 must allege specific facts to show an agreement and must show that an actual deprivation of constitutional rights resulted from the alleged conspiracy. *Woodrum v. Woodward County*, 866 F.2d 1121 at 1126 (9th Cir. 1989). 42 U.S.C. § 1983 does not apply to all conspiratorial tortious interferences with the rights of others, but only those in which the plaintiff has alleged that the defendants agreed to commit an unlawful act. *Singer v. Wadman*, 595 F. Supp. 188 at 270 (D. Utah 1982), *aff'd* 745 F.2d 606 at 609 (10th Cir. 1984).

The complaint against Janet Wagner lacked each of the foregoing items and she moved to dismiss that action on the grounds that: (1) it was an improper splitting of actions; and (2) she was an improper party in a civil rights action. The motion was granted and the district court, *sua sponte* also dismissed the action against the investigating officers.

On appeal to the Ninth Circuit, the court rejected Janet Wagner's argument that she was an improper party with the observation:

> In support of their conspiracy claim, the Delews allege that Janet Kathleen Wagner left the accident scene during the investigation and that LVMPD and NHP officers permitted Wagner to do so.[1]

1. The information concerning Mrs. Wagner's leaving the scene during the accident investigation comes from Mrs. Wagner's deposition wherein she indicated that she accompanied by two officers to her home nearby to use the bathroom. Deposition of Janet Wagner pp. 145-147. Appendix A-11 to A-13.

> Construing these facts in a light most favorable to the Delews, it is reasonable to infer an understanding between Wagner and the officers to cover-up the true facts of Erin Rae Delew's death and thereby deprive the Delews of their right of access to the courts. Pet. App. p. 8a, 9a

In a precedent setting decision the Ninth Circuit (for the first time) ignored the requirement (1) that there must be a violation of an underlying civil right, and (2) that there must be an allegation that the defendants agreed to commit an unlawful act as a threshold for stating a cause of action for denial of meaningful access to the courts. *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds sub nom., Hanrahan v. Hampton*, 446 U.S. 754, 64 L. Ed. 2d 670, 100 S. Ct. 1987 (1980); *Singer v. Wadman*, 595 F. Supp. 188, 270 (D. Utah 1982), *aff'd*, 745 F.2d 606, 609 (10th Cir 1984).

The Ninth Circuit has recognized inadequate investigation as sufficient grounds to state a civil rights claim only when there was another recognized constitutional right involved, that is, when a party claiming the denial of meaningful access to the courts has been denied a constitutionally protected right. *Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1985) (the Court found no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved); *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996) (police failure to follow up on investigation of reported rape by one of its officers); *Scher v. Chief Postal Inspector*, 973 F.2d 682 (8th Cir. 1992) (failure to investigate complaints of discrimination by postal employees).

Although the Ninth Circuit determined that the DeLews' § 1983 action for improper and inadequate investigation of a

traffic accident was premature, it ruled that the action should not have been dismissed with prejudice and ordered it remanded to be dismissed without prejudice.

A. Procedural Background

This action was filed two years after the original wrongful death action was filed in State Court. The case was removed to Federal Court and Janet Wagner moved to be dismissed from the action. The District Court granted her motion and *sua sponte* dismissed all claims with prejudice.

The plaintiffs appealed that decision to the Ninth Circuit and the case was reversed with instructions that the case was to be dismissed without prejudice. The Ninth Circuit determined that without an adjudication of on the underlying "wrongful death action" the plaintiffs would not know if they had been denied meaningful access to the courts.

REASONS FOR GRANTING THE WRIT

Should this Court grant the petition for writ of certiorari in this case it will be called upon to review whether a party who is actively seeking redress in state court and who has had full access to discovery has a contemporaneous claim under 42 U.S.C. § 1983 for denial of meaningful access to the courts. The court will further be called upon to determine what, if any, prerequisites must exist before one can assert a claim for "denial of meaningful access to the courts." Finally, this court will be asked to determine the extent of involvement necessary before a civilian can be joined as a co-conspirator defendant in a § 1983 action.

I.

THE NINTH CIRCUIT'S DECISION CONCERNING THE RIGHT TO MEANINGFUL ACCESS TO THE COURTS IS IN CONFLICT WITH ITS DECISION IN *GOMEZ v. WHITNEY* AND THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME ISSUE.

In *Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1985), the Appellant's son died as the result of an apparent accident while trespassing on a construction site with two other juveniles. For almost two years after his son's death Mr. Gomez attempted to persuade the police to re-open the investigation. When his efforts failed he brought an action under 42 U.S.C. § 1983 claiming that his civil rights had been violated by the police department's inadequate investigation. The Ninth Circuit simply said:

> A prerequisite to recovery under the Civil Rights Act, 42 U.S.C. § 1983, is that the plaintiff prove that the defendants deprived him of a right secured by the Constitution and the laws of the United States. Martinez v. California, 444 U.S. 277, 284, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980). A threshold question in this appeal, then, is whether or not the appellants' claim involves the deprivation of a protected right.
>
> The appellants claim that the right infringed was a due process right to have a full and fair police investigation into violence done against themselves or their children. However, we can find no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved. See, e.g., Smith v. Ross, 482 F.2d 33 (6th Cir. 1973) (police failure to protect against housing discrimination).

> Because the appellants have failed to state facts that constitute the infringement of a protected right, n1 their § 1983 claim must necessarily fail, and the district court was consequently correct in granting summary judgment against them. n2 The judgment of the district court is therefore AFFIRMED.

Id. at 1006.

Similarly, in *Scher v. Chief Postal Inspector*, 973 F.2d 682 (8th Cir. 1992), the Eighth Circuit ruled that the plaintiffs had no constitutional right to an investigation of their complaints. In *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996), the police ignored the plaintiffs complaint of rape by a police officer. The district ruled that without evidence of a policy or practice of failing to investigate complaint of sexual abuse by a police officer, the police department was an improper party. In *Crowder v. Sinyard,* 884 F.2d 804 (5th Cir. 1989), *cert. denied*, 496 U.S. 974 (1990), *abrogated on other grounds by Horton v. California,* 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990), the plaintiff's claim for denial of meaningful access to the courts arose out of an illegal seizure and removal of property from the state.

The plaintiffs claim that there right to "meaningful access to the courts" has been denied because the traffic investigation was flawed and covered up evidence favorable to their claim. That allegation, without the infringement of some other constitutional right, is not the basis for a valid claim under 42 U.S.C. § 1983. The plaintiffs must be able to show an illegal search and seizure, an unlawful taking or confiscation of property, an illegal arrest, abuse of police power, or some other infringement of a civil right before a police investigation will provide the nexus for a § 1983 civil rights action.

II.

THE NINTH CIRCUIT'S DECISION IS INCONSISTENT IN THAT IT RECOGNIZES THE EXISTENCE OF A STATE COURT ACTION AND YET RULES THAT A § 1983 MAY EXIST IN THE FUTURE BUT MUST BE HELD IN ABEYANCE.

In its decision the Ninth Circuit observed:

> On November 10, 1994, the Delews filed a wrongful death action against Janet Kathleen Wagner in state court. We are informed that trial is set for February, 1999. Pet. App. 6a.

Obviously the DeLews have had access to the courts and have been allowed to explore through discovery all aspects of the investigation surrounding the DeLew/Wagner accident. Nevertheless the Ninth Circuit determined that the plaintiffs could hold in abeyance a § 1983 action — which could be filed after the termination of the state court action.

There appears to be uniformity among the jurisdictions dealing with a "denial of meaningful access to the courts" arising out of police conduct during an investigation. Research suggests agreement among the circuits (with the exception of the instant case) that a "cover-up" or "refusal to investigate" is not a denial of "meaningful access to the courts" when a viable state action has been filed and the "cover-up" has been discovered.

In *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1996) the court ruled that: (1) the aggrieved party must exhaust his remedies in state court; and (2) that when the alleged cover-up is available to the state court there is no denial of access to

the courts. *See also Joyce v. Mavromatis*, 783 F.2d 56 (6th Cir. 1986) (Despite police officers efforts to defeat a personal injury claim against the police chief's son by revoking a traffic citation, altering the police report, and having new lines painted on the street, the facts were known to the plaintiff and because the state judge could confront those issues there was no denial of access to the courts). *See also Crowder v. Sinyard,* 884 F.2d 804 (5th Cir 1989); *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995); *Thompson v. Boggs*, 33 F.3d 847, 852-53 (7th Cir. 1994) (police officers who omitted information from police reports did not deny access to court, since facts known to plaintiff were sufficient to enable him to promptly file a lawsuit); *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994). In each of these cases the courts held that access to the state court extinguished any civil rights action under § 1983.

The instant action seems to stand alone in its remedy of holding a potential § 1983 action in suspension pending an outcome of the state court action. The Sixth Circuit suggests that a potential § 1983 action does not toll the running of the statute of limitations and would therefore be untimely. *See generally, Swekel v. City of River Rouge, supra.* and *Joyce v. Mavromatis, supra.*

The unique decision by the Ninth Circuit is fraught with potential problems from *res judicata, stare decisis,* collateral estopple and other due process considerations, to evidentiary issues. No other jurisdiction has suggested such a remedy and the trail court is left to speculate as to what considerations will be given to determine if the state court trial provide "adequate access to the court." The court's solution is unworkable.

III.

THE NINTH CIRCUIT COURT'S DECISION CONCERNING CONSPIRACY IS CONTRARY TO THE PLEADING REQUIREMENTS FOR CONSPIRACY.

The decision of the Ninth Circuit states:

> In support of their conspiracy claim, the Delews allege that Janet Kathleen Wagner left the accident scene during the investigation and that LVMPD and NHP officers permitted Wagner to do so.[2]

A conspiracy action against a civilian under 42 U.S.C. § 1983 must allege specific facts to show an agreement and must show an actual deprivation of constitutional rights resulted from the alleged conspiracy. *Woodrum v. Woodward County*, 866 F.2d 1121 at 1126 (9th Cir. 1989). 42 U.S.C. § 1983 does not apply to all conspiratorial tortious interferences with the rights of others, but only allege a those in which the plaintiff has alleged that the defendants agreed to commit an unlawful act. *Singer v. Wadman*, 595 F. Supp. 188 at 270 (D. Utah 1982), *aff'd* 745 F.2d 606 at 609 (10th Cir. 1984)

It may be argued that an agreement was formed to allow Mrs. Wagner to leave the accident scene, but that act is not associated with any allegation or fact that would suggest that a deprivation of constitutional rights resulted therefrom.

> The Third Circuit recently considered the subject of pleading in civil rights actions, and reaffirmed its prior precedent:

---

2. The information concerning Mrs. Wagner's leaving the scene during the accident investigation comes from Mrs. Wagner's deposition wherein she indicated that she accompanied by two officers to her home nearby to use the bathroom. Deposition of Janet Wagner pp. 145-147.

> In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity. Kauffman v. Moss, 420 F.2d 1270, 1275-76 (3rd Cir.), cert. denied, 400 U.S. 846, [91 S. Ct. 93, 27 L. Ed. 2d 84] (1970); Negrich v. Hohn, 379 F.2d 213 (3rd Cir. 1967).

Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3rd Cir. 1976) (footnote omitted).

The court went on to explain the basis for the rule:

> The rationale of the Negrich requirement that facts be specifically averred was outlined in Valley v. Maule, 297 F. Supp. 958 (D.Conn.1968), and was quoted approvingly in Kauffman v. Moss, supra, at 1276 n. 15:
>
> In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants — public officials, policemen and citizens alike, considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

Id.

> The complaint at bar falls decisively within the Rotolo-Negrich rule. It contains seventeen pages of factual and legal allegations; yet aside from the paragraphs stating the names and addresses of the individual defendants, it is altogether bereft of any reference to their activities. The conclusory charge of conspiracy in paragraph 41 of the complaint serves as the sole allegation which implicates these defendants at all. Under Rotolo, such a complaint is inadequate.

A conspiracy claim must include an agreement between the defendants to commit an unlawful act and an overt act inflicting the particular injury of which the plaintiff complains. *Hampton v. Hanrahan*, 600 F.2d 600, 620-24 (7th Cir. 1979). Again, neither the agreement to commit an unlawful act nor the overt act are alleged against Mrs. Wagner. The single assertion that Mrs. Wagner left the scene of the accident does little to further the alleged police cover-up. Significantly, even if her short absence from the investigative scene could be an element of conspiracy it has not resulted in any injury to the plaintiffs.

The Ninth Circuit Court's terse treatment of the "conspiracy claim" fails to deal with fundamental issues critical to such a claim. Those issues are totally lacking in the plaintiff's complaint.

CONCLUSION

Should this Court grant the petition for writ of certiorari, it is essential that this Court also examine the prerequisites for bringing an action pursuant to 42 U.S.C. § 1983 for denial of meaningful access to the courts caused by an accident investigation. Similarly, it is critical to Janet Wagner's rights that the Court review the elements essential to join a civilian in a § 1983 civil rights action.

For these reasons, should the Court grant the petition for writ of certiorari, it should also grant this conditional cross-petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS FILED OCTOBER 29, 1996

DISTRICT COURT

CLARK COUNTY, NEVADA

Case No. A339613

Dept. No. II

Docket "D"

DELEW, MICHAEL C., ET AL
ESTATE OF ERIN RAE DELEW
MAYBERRY, ROY H.
MAYBERRY, VICKIE

Plaintiff,

VS.

WAGNER, JANET K.

Defendant.

BEFORE THE HONORABLE NANCY A. BECKER,
DISTRICT JUDGE

REPORTER'S TRANSCRIPT RE:

PLAINTIFF'S MOTION FOR LEAVE TO
FILE AMENDED COMPLAINT

TUESDAY, SEPTEMBER 24, 1996

* * *

Appendix A

TUESDAY, SEPTEMBER 24, 1996; 9:00 A.M.

[2] THE COURT: Delew versus Wagner. I don't know if you were able to prepare any opposition, or if you actually have an opposition, Mr. Edwards.

MR. EDWARDS: I have submitted to the Court a — and I had it delivered to chambers, a seven page opposition to the plaintiff's motion, Your Honor.

THE COURT: Argument, Mr. Foley?

MR. EDWARDS: I would like the Court to have the opportunity to review that before we —

MR. FOLEY: And I did —

THE COURT: All right. I'll let you argue today, I'll take it under advisement and then I'll read the opposition.

MR. FOLEY: And I did receive the opposition, Your Honor.

This is our Motion to Amend the Complaint, Your *Honor*. It's a very difficult case. The basic facts are that Erin Delew as was riding a bicycle and was run over by a motorist and killed. The motorist was a Metro police officer's wife. The motorist, through deposition now, admits that she had had — purchased three beers and consumed the better part of three beers through a straw on her way home from work. She admits that she was speeding at the time of the accident. The problem is she wasn't cited and she wasn't given a blood alcohol test until some three [3] hours after the accident.

Her husband, who is a traffic officer, or was at the time with Metro — this happened right in their neighborhood and he was one of the first people to arrive at the scene. Over the course of the three hours there were over twenty Metro and Nevada Highway Patrol officers who arrived at the scene. Some smelled alcohol. In fact, in one instance the highway patrolman who had been called to the scene, because Metro apparently said they had a conflict, but yet they stayed at the scene — one highway patrolman said to Mrs. Wagner, I thought I smelled alcohol on your breath earlier, and a lieutenant from Metro stepped forward and said, you know, that was probably me, I was having a beer with dinner.

What we're seeking to do at this point in time, now that we've taken virtually all of these officers' depositions, is to amend the complaint to assert 1983 actions. The opposition by Mr. Edwards goes into a number of issues. Primarily he's making a Motion to Dismiss on behalf of Metro, saying that it's not a proper 1983 action. The fact is that under Rule 15 leave to amend should be freely granted unless there's undue delay, bad faith, or dilatory motive. Which can't possibly be argued in this case. We have taken extensive discovery to get to the heart of this cover-up.

What may happen in the future, whether someone files a [4] Motion to Sever or whether someone files a Motion to Dismiss, so be it. But, we should be allowed to amend the Complaint to bring these parties in, and they're all critical to this one case. If we had to pursue two cases, we'd be calling the exact same witnesses to the stand on every case. Because of the fact that, for instance, in the wrongful death case, we have to call the police officers because they didn't do the blood alcohol test, they didn't do the reconstruction. We need them

to testify as to what they saw at the accident, what they did at the accident, and what they didn't do at the accident. Because we're going to have to show by circumstantial evidence that she was intoxicated and he was being protected by her husband. Same thing goes in the 1983 action. Mrs. Wagner and all of the percipient witnesses will be witnesses in that trial. It will be an absolute and complete duplication of the trial. Thank you.

THE COURT: Mr. Edwards.

MR. EDWARDS: Several things, Your Honor. First of all, to put this case in the proper setting, let me, if I may, just read from the only eyewitness' report to Metro.

"As I came up to Lake Mead, I saw a woman on a dark bike, no strobe or lights, swerving a lot because she was trying to negotiate turning to cross the street going uphill, plus she had a bag of groceries she was carrying. She had trouble getting any speed to cross. She may not have seen the Explorer coming [5] towards her because she had a headset on. The Explorer certainly could not see her until it was too late because the road was curving, trees blocked the vision in mid or divider as driver came up no faster than the speed limit. I noted that because before impact I realized the Explorer would collide with the bike-rider before it happened."

Now, the plaintiff in this case is attempting to bring in not circumstantial evidence, but collateral evidence to create an illusion that there is collusion where none existed. What actually happened in this case was that when the police arrived they saw who the driver was and they called in an independent investigating force to conduct the investigation. As a result of that my client was prejudiced, not his. Because my client was

the one that didn't have the blood test taken within the appropriate two hours and, if she had, it would have shown that the alcohol she was drinking fifteen minutes before the accident hadn't even entered her bloodstream at the time of the accident. They —

THE COURT: Oh, I'm sure if she said, hey, give me a blood test right now, they would have done that, Mr. Edwards. I don't have too much doubt that — But, under the circumstances that's not the issue at the moment.

MR. EDWARDS: Well, that's right. What they're attempting to do, in fact they have done in this case, is that they have [6] taken the deposition of — I think it's eleven different police officers, every officer that was at the scene, except possibly two or three peripheral officers, they have deposed. They have deposed those after they intended to bring Metro into the case and have done the discovery and obtained those depositions before bringing Metro into the case. Those depositions aren't even admissible as to Metro. This case — There's an attempt to try by collateral evidence issues that don't have any bearing on the wrongful death.

And the simple fact of the matter is that a 1983 action doesn't even lie on behalf of the decedent. The decedent is on — unfortunately, was killed instantly. When the Metro officers arrive, anything they do after that point has no bearing on her civil rights. And the Ninth Circuit has ruled on that very issue. The Ninth Circuit points out, in the case of *Cartwright versus City of Concord*, defendant's argue that no post death events could legally interfere with the plaintiff's alleged constitutional rights under the authority of *Guiden versus Phillips*. And it goes on to say those authorities are persuasive that the civil

rights of a person cannot be violated after death. So, a 1983 action doesn't even lie on behalf of the decedent.

The real issue is was there negligence by the driver when the decedent was killed. That can be tried. That can be tried without — And in fact, we've been doing discovery for two [7] years on that very issue. And can be tried without any involvement or any action against the police officers. If they feel like they have an action against the police officers, let them bring it. But, not in this case. It doesn't belong in his case. There's been too much water under the bridge, there's been too many things done that are improper in this particular case for them to try to bring into this case and try this case on collateral issues. And that's what they would like to do.

What they would like to do is try the police officers and their investigation to prove my client was negligent. And my client's negligence can stand or fall on its own, I have no problem with that. I am here to defend her and I can defend her, I can defend her with whatever evidence is direct and specific to her. And if they have — There's a difference between circumstantial evidence and collateral evidence. If there is circumstantial evidence, that comes in. Collateral evidence comes in to a point, but it doesn't come in to prove negligence and it can't create an illusion or a fiction that doesn't exist. And NRS —

THE COURT: All right, Mr. Edwards. I've read the opposition. I'm not going to allow you to amend the Complaint because I think you need to file a separate lawsuit, Mr. Foley. I'm not going to try — Because there are issues about whether or not the heirs can maintain a civil rights action for whatever [8] diminution in value of their case is of their personal injury lawsuit as a result of the investigation.

While I recognize that many of the witnesses may be the same in both lawsuits, assuming that you have a cause of action, which another judge can decide on a Motion to Dismiss, the problem that I have is, one, all these depositions and all of the discovery was taken when these people were not party, and therefore they were not represented with that in mind. And I think that you're going to have to go back through the discovery and go back through those issues when that party has been fully informed of the nature of the charges against the particular police agencies and/or the officers involved and try it as a separate issue.

Certainly you can call in all those witnesses here as to what they saw or observed and why they did or didn't do what you believe should have been standard tests, and that the inference that they didn't do it is because it would have been negative to Mrs. Wagner, but I'm not going to allow you to amend and bring in that separate cause of action into this case.

MR. FOLEY: I understand, Your Honor. If I might — we will file the lawsuit separately — I'd like to ask Your Honor, so that we could have an opportunity to properly brief it, if your order could be without prejudice, so that we could file a Motion to Consolidate down the road.

[9] THE COURT: No, I'm not going to consolidate a civil conspiracy case in with a personal injury. Because the issue with regard to the personal injury is the negligence and —

MR. FOLEY: I understand, but it's so hard to prove negligence when the evidence is not gathered. And quite frankly, Mrs. Wagner is going to be a party in both suits. Again, and I'm very conscious of not arguing with Your Honor, but —

THE COURT: No. I think that the —

MR. FOLEY: — just so that we can present points and authorities —

THE COURT: — prejudice of trying them together outweighs trying to make two separate claims. A civil rights case requires some very, very specific things under federal and state law, and you may not have any of that, and that should be treated separately because the damages from that are separate. I mean, you don't lose the personal injury case, then there is no case because there's no damages in the civil conspiracy case.

MR. FOLEY: That's not true, Your Honor. We've got authority for that. Unfortunately we haven't briefed it, but what we have is an aggravation of loss of consortium. The police, as a result of their investigation, concluded and told the family that this woman had apparently committed suicide. She was a good bicyclist and she just blindly drove her bicycle in front of this vehicle. Where the facts as they came out and [10] started coming out were that, again, some three hours later she has a point o-five —

THE COURT: That Mrs. Wagner may well have been under the influence, right.

MR. FOLEY: Well, there's no —

THE COURT: Or may not have been.

MR. FOLEY: She had been drinking alcohol, in any event.

THE COURT: Correct.

MR. FOLEY: And again, there had been speeding and there had bean a cover-up. So, the point Your Honor made with respect to damages, they are interrelated. Even if we win the wrongful death case, or even if we lose the wrongful death case, we still pursue the civil rights case from the damage standpoint.

THE COURT: Well, I honestly believe that to try them both just isn't appropriate. Perhaps if you'd brought them both at the very beginning I might have felt differently. But, having conducted all of these depositions with people who were being deposed as percipient witnesses and not as defendants, I'm not going to allow that to occur that now you bring in all of those same people as defendants and then have to go through the arguments about now can the discovery be used, or not used, and what the circumstances may be. File your separate lawsuit and you can deal with it under that circumstance.

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APPENDIX B — EXCERPTS FROM DEPOSITION OF JANET KATHLEEN WAGNER DATED NOVEMBER 7, 1995

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No. A339613
Dept. No. XIII
DOCKET NO. "G"

DEPOSITION OF JANET KATHLEEN WAGNER
November 7, 1995

MICHAEL C. DELEW, individually; MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY,

Plaintiffs,

vs.

JANET KATHLEEN WAGNER, and DOES I through V inclusive, and ROE CORPORATIONS V through X,

Defendants.

* * *

[145] Q Any other car, patrol car?

A Yes. I sat in a patrol car.

Q Just one patrol car or more than one?

A Once or twice. I don't recall if it was the same car or not.

Q Okay. Do you know whose patrol car it was?

A No.

Q How is it that you ended up sitting in a patrol car? What led to sitting in that patrol car?

A It was sometime after the accident had occurred, and I asked if I could go home to use the restroom, and they drove me to the house to do that.

Q Okay. Who drove you to the house?

A I don't know who they were.

Q Was your husband with you?

A Yes.

Q And where were you sitting?

A In the back seat of the car.

Q And where was your husband sitting?

A In the back seat of the car.

Q And were there two officers in the front?

A Yes.

Q And you don't know which officers they were?

[146] A No, I don't know that I even saw who they were.

Q And what was said in the car on the way to your house?

A I don't recall anything being said.

Q What route did the patrol officer take to get to your house from, from there, from the scene?

A I remember them bringing me north on Hillpointe rather than south on Hillpointe. They took a street other than going straight up Lake Mead. I think that's because it was blocked off, you know, with the accident investigation going on. And I don't remember specifically what street they drove down though.

Q When you left Lake — when you left the scene of the collision were you going west or east on Lake Mead?

A I'm sorry. What?

Q When you left the scene of the collision with those two officers and your husband were you going left — I'm sorry — were you going west or east on Lake Mead?

A I don't remember where their car was originally parked or stationed. We didn't go west on Lake Mead from Ridgemoor, although we may have traveled a short distance west to go to

Ridgemoor and possibly then go south would be my guess. I don't specifically remember doing that.

[147] Q Did they use their overhead lights at any time?

A Not that I'm aware of.

Q And when you got to your house, did the officers come in?

A No

Q Did your husband come in with you?

A I think he did come in. Yes. Yes.

Q Which bathroom in the house did you use? Did you use your master bathroom where your bedroom was?

A No. I used one downstairs that's closer to the front door.

Q Do you know if the officers when they took you to your home, did they radio into dispatch to tell them that they were taking you to —

A I have no idea.

Q Did you have a glass of water when you were at home?

A I don't recall doing that, no.

Q Was your mouth at all parched after the collision?

A I don't remember specifically, no.

Q Did you drink any water at the collision or at your home?

A I remember somebody offering me water, but I don't remember if I drank it or not.

[148] MR. RASTELLO: Do you want to take a break?

MR. EDWARDS: I will in a minute.

Q (BY MR. RASTELLO) In the bathroom where you went to the bathroom at home, do you have a cup or paper cups that you could have used to drink water?

A I wouldn't have had any paper cups. There may have been a cup in there at the time. I don't remember what I had sitting in the bathroom there at the time.

Q Did you go to the kitchen?

A I don't remember doing that, no.

Q Okay. Were you and your husband alone in the house at that time?

A Again, I'm not sure if he even came into the house or just to the door but there was nobody else there at the time, no.

Q Okay. Did you and your husband have a conversation at the house, either inside the house or right outside the house?

MR. EDWARDS: You can answer yes or no.

A No.

Q (BY MR. RASTELLO) Nothing was said?

A Not that I remember, no.

* * *